RARY
SUPREME COURT, U. S.
MOTION FILED
DEC - 8 1971

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Certiorari to the Supreme Court of the State of Washington.

Motion for Leave to File Brief Amicus Curiae on Behalf of the National Association of Theatre Owners, Inc., and Brief Amicus Curiae.

STANLEY FLEISHMAN,
6922 Hollywood Blvd., Suite 718,
Hollywood, Calif. 90028,

SEYMOUR I. FEIG,
1501 Broadway,
New York, New York 10036,

Attorneys for National Association of Theatre Owners, Inc., Amicus Curiae.

SAM ROSENWEIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Motion of the National Association of Theatre Owners, Inc., for Leave to File Brief Amicus Curiae 1

Interest of Amicus 5

Questions Presented 5

Argument 6

I.

The Seizure and Suppression of a Motion Picture Film, Without a Prior Adversary Hearing to Determine the Alleged Obscenity of the Film Seized, Constitutes a Prior Restraint on the Exercise of Freedom of Expression, in Violation of the Free Speech and Press, Due Process, and Search and Seizure Provisions of the First, Fourth and Fourteenth Amendments and the Interpretive Decisions of the Court 6

II.

The Imposition of Criminal Sanctions Under a State General Obscenity Statute, as Construed and Applied to the Exhibition of a Nonobscene Motion Picture Film, Upon the Ground That Excerpts From the Film May Be "Offensive" or Invade the "Privacy" of Some Unknown Viewer, Abridges the Exercise of Freedoms of Speech and Press and Arbitrarily Deprives Persons of Liberty and Property Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments and the Interpretive Decisions of the Court 15

Conclusion 24

TABLE OF AUTHORITIES CITED

Cases	Page
Bantam Books, Inc. v. Sullivan, 372 U.S. 58	10
Bethview Amusement Corp. v. Cahn, 416 F. 2d 410, cert. den. 397 U.S. 920	11, 13
Boddie v. Connecticut, 91 S. Ct. 780	7, 8
Breard v. Alexandria, 341 U.S. 622	21
Butler v. Michigan, 352 U.S. 380	17
Cambist Films, Inc. v. Duggan, 420 F. 2d 687	12
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175	10
Cohen v. California, 91 S. Ct. 1780	20
Demich, Inc. v. Ferdon, 426 F. 2d 643, vac. 91 S. Ct. 1223	12
Escalera v. New York City Housing Authority, 425 F. 2d 853, cert. den. 400 U.S. 853	9
Freedman v. Maryland, 380 U.S. 51	10
Garner v. Louisiana, 368 U.S. 157	16
Ginzburg v. United States, 383 U.S. 463	18
Goldberg v. Kelly, 397 U.S. 254	8
Hall v. Garson, 430 F. 2d 430	9
Jacobellis v. Ohio, 378 U.S. 184	19
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684	21
Klim v. Jones, 315 F. Supp. 109	9
Marcus v. Search Warrants of Property, 367 U.S. 717	6, 11
Martin v. Struthers, 319 U.S. 141	21
Metzger v. Pearcy, 393 F. 2d 202	12
Mishkin v. New York, 383 U.S. 502	18, 19
NAACP v. Button, 371 U.S. 415	23
New York Times v. Sullivan, 376 U.S. 254	22

Page

New York Times Co. v. United States, 91 S. Ct. 2140 7

Public Utilities Commission v. Pollak, 343 U.S. 451 21

Quantity of Copies of Books v. Kansas, 378 U.S. 205 11

Randone v. Appellate Department, 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 9

Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 22

Redrup v. New York, 386 U.S. 767 .....18, 19, 20

Roth v. United States, 354 U.S. 476 16

Rowan v. United States Post Office Department, 397 U.S. 728 21

Santiago v. McElroy, 319 F. Supp. 284 9

Shuttlesworth v. Birmingham, 382 U.S. 87 16

Smith v. California, 361 U.S. 147 22

Sniadach v. Family Finance Corp., 395 U.S. 337 7

Speiser v. Randall, 357 U.S. 513 6

Spinar and Germain v. United States, 440 F. 2d 1241 19

Terminiello v. City of Chicago, 337 U.S. 1 21

Thompson v. City of Louisville, 362 U.S. 199 16

208 Cinema, Inc. v. Vergari, 298 F. Supp. 1175 (D.C. N.Y. 1969), rev. Oct. 9, 1969, ... F. 2d .... (2 Cir.) Docket No. 33997, cert. den. 397 U.S. 934 11

Tyrone, Inc. v. Wilkinson, 410 F. 2d 639, cert. den. 396 U.S. 985 11

United States v. Alexander, 428 F. 2d 1169 ....11, 12, 14

United States v. Baranov, 418 F. 2d 1051 19

Page

Wilhelm v. Turner, 431 F. 2d 177, cert. den. sub nom. Turner v. Wilhelm, 91 S. Ct. 919 12

Wisconsin v. Constantineau, 400 U.S. 433 8

Statutes

United States Constitution, First Amendment 2, 3, 5, 6, 7, 10, 11, 12, 13, 14, 15, 17, 18, 22, 23

United States Constitution, Fourth Amendment .. 6

United States Constitution, Fourteenth Amendment 5, 6, 11, 15, 17, 18, 22

Textbooks

Emerson, The System of Freedom of Expression, pp. 364-365 23

Emerson, The System of Freedom of Expression (1970), p. 490 19

Magrath, The Obscenity Cases: Grapes of Roth, 1966, S. Ct. Rev. 7, pp. 66-67 19

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Certiorari to the Supreme Court of the State of Washington.

Motion of the National Association of Theatre Owners, Inc., for Leave to File Brief Amicus Curiae.

The National Association of Theatre Owners, Inc., referred to hereafter as NATO, respectfully moves for leave to file a brief amicus curiae in this case. Petitioner's attorney has consented to the filing of this brief; the attorney for the respondent is unwilling to consent.

The National Association of Theatre Owners, Inc., is the largest trade association of exhibitors of motion picture films in the United States. NATO has regional offices in virtually all of the fifty states, each of the regional offices electing delegates to the National Association. The headquarters of NATO are in New York City, with officers elected by a Board of Directors at an annual meeting for one year's service. Among the

purposes and objectives of NATO is to cultivate the highest possible standards in all matters relating generally to the motion picture industry, and in particular to the exhibition of motion picture films. The aim of the organization is to see to it that the exhibition of motion picture films is always consistent with the public interest.

The case herein presents issues of crucial significance in the areas of free speech and press and due process of law, affecting the interests of the viewing community as well as the exhibitors of motion picture films. The Court has held that liberty of expression by means of motion pictures is guaranteed by the Constitution; that the basic principles of freedom of speech and press do not vary; and that freedom of expression is in all cases the rule.

NATO believes that the issues to which our brief is addressed are extremely important, not only in terms of the strict standards for judging obscenity enunciated by the Court, but in terms of all aspects of the First Amendment. For if motion picture films may be seized and suppressed without a prior adversary hearing before a judicial officer, then the danger of abridgment of the right of the public in a free society to unobstructed circulation and exhibition of constitutionally protected expression in all areas is manifest. If state criminal statutes which purport to prohibit the exhibition of obscene motion picture films can be invoked to impose sanctions upon exhibitors of nonobscene films, solely upon the ground that some of the depictions or representations in the films may be "offensive" to unknown members of the public, then freedom of expression in all areas of public concern will be seriously affected and undermined.

NATO believes that the doctrinal standards enunciated by this Court in the light of the requirements of the First Amendment are opposed to the *ex parte* suppression of material ordinarily entitled to constitutional protection. The essence of ordered liberty is an opportunity to be heard before condemnation. Moreover, NATO believes that limitations upon the exhibition of films containing ideas, informational or entertaining, merely because such expression may be deemed offensive by some unknown viewer, is a threat to the entire system of free expression. The obscenity exception to the First Amendment should not be broadened into a wide-ranging formula for governmental censorship. Sanctions resting on a generalized, standardless version of "offensiveness" should not be upheld if the vitality of the First Amendment guarantees are to be maintained.

NATO believes that this amicus brief will be of assistance to the Court by pointing out the developing constitutional standards and doctrinal developments in the free speech and press and due process areas which are opposed to *ex parte* and arbitrary and capricious suppression of expression. For these reasons, NATO respectfully requests leave to file the within brief *amicus curiae*.

Respectfully submitted,

STANLEY FLEISHMAN,
SEYMOUR I. FEIG,
By STANLEY FLEISHMAN,
Attorneys for Movant.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Certiorari to the Supreme Court of the State of Washington.

BRIEF AMICUS.

Interest of Amicus.

The interest of Amicus is set out in the preceding motion for leave to file this brief.

Questions Presented.

This brief is addressed, first, to the issue of whether the seizure and suppression of motion picture films, without a prior adversary hearing to determine the alleged obscenity of the films seized, is violative of the First Amendment; and, second, to the issue of whether, consistent with the free speech and press and due process guarantees of the First and Fourteenth Amendments, criminal sanctions may be imposed under a general obscenity statute upon the exhibitor of a motion picture film entitled to constitutional protection, solely because some hypothetical person may deem some part of the film "offensive" or an invasion of "privacy".

ARGUMENT.

I.

The Seizure and Suppression of a Motion Picture Film, Without a Prior Adversary Hearing to Determine the Alleged Obscenity of the Film Seized, Constitutes a Prior Restraint on the Exercise of Freedom of Expression, in Violation of the Free Speech and Press, Due Process, and Search and Seizure Provisions of the First, Fourth and Fourteenth Amendments and the Interpretive Decisions of the Court.

The guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. The Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731; *Speiser v. Randall*, 357 U.S. 513, 525.

In the discussion which follows, we examine, first, the constitutional principles embodied in the "due process" precept that an individual is guaranteed a right to notice and hearing before he is deprived of a significant property interest. It appears clear from the decided cases that the root requirement under the due process provisions of the Constitution is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. Following this discussion, we turn to the precedents which demonstrate the abhorrence of *ex parte* restraints

in the First Amendment area. For here the issue is not only the vindication of individual rights, but the right of the public to unobstructed dissemination of constitutionally protected expression. We are dealing with freedom of expression, an indispensable condition of nearly every other freedom, where history and constitutional text combine to support the view that all media of communication must be left free, "without censorship, injunctions or prior restraints". Justice Black, concurring in *New York Times Co. v. United States*, 91 S. Ct. 2140, 2143.

1. It is generally accepted as fundamental to procedural due process that a person be afforded "notice and an opportunity to be heard" before he may be deprived of life, liberty or property. The mainstream of the procedural due process decisions of the courts is the recognition that the most fundamental ingredient of the due process guarantee is "a meaningful opportunity to be heard". Thus, while it is customary today to begin discussion of this principle with *Sniadach v. Family Finance Corp.*, 395 U.S. 337, it is important to emphasize that the *Sniadach* opinion did not establish a new constitutional rule, but simply brought traditional procedural due process analysis, worked out over many decades of constitutional litigation, to bear upon the question at issue in the case. "Early in our jurisprudence" it was held that "due process of law signifies a right to be heard in one's defense". *Boddie v. Connecticut*, 91 S. Ct, 780, 785-786.

In *Sniadach*, the Wisconsin prejudgment garnishment procedure was held violative of the fundamental principles of due process because of the absence of notice and prior hearing to the garnishee. Concurring.

Justice Harlan stated, ". . . that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use". 395 U.S. at 343. In *Goldberg v. Kelly,* 397 U.S. 254, the Court held that procedural due process required that a welfare recipient be afforded an opportunity to be heard before his welfare payments could be terminated. Justice Brennan, writing for the Court, noted that a crucial factor in the context of the case was that termination of said pending resolution of a controversy over eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits. . . . In the present context these [due process] principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally". 397 U.S. at 264, 267-268. In *Boddie v. Connecticut,* the Court held that due process of law prohibited a State from denying indigents access to the courts solely because of inability to pay court fees and costs in divorce actions. In the course of the opinion, Justice Harlan held that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause". 91 S. Ct. at 787.

Other recent decisions have continued this far-reaching trend. *Wisconsin v. Constantineau,* 400 U.S. 433 (state statute authorizing the posting in liquor outlets of a notice prohibiting sale of liquor to specified individuals, without notice or hearing prior to posting,

held unconstitutional as constituting denial of procedural due process); *Hall v. Garson,* 430 F. 2d 430 (5 Cir. 1970) (Texas statute giving landlord a lien on personal goods of tenants and authorizing landlord to enforce that lien by peremptory seizure of the property raised due process issue under the Constitution; *Escalera v. New York City Housing Authority,* 425 F. 2d 853 (2 Cir. 1970), cert. denied 400 U.S. 853, (Tenant in public housing project deprived of his continued tenancy without affording him adequate procedural safeguards raises appropriate constitutional claim in federal court; *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970), (Distress sales under distraint procedure of Pennsylvania Landlord and Tenant Act amounted to a taking of property without procedural due process since sales did not follow a hearing of some sort before the tenant was deprived of his property); *Klim v. Jones,* 315 F. Supp. 109 (N.D. Cal. 1970), (California Innkeeper's Lien Law held constitutionally infirm for failure to provide for any sort of hearing prior to the imposition of the innkeeper's lien thereunder). See also, *Randone v. Appellate Department,* 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971), (California pre-judgment attachment procedure violates due process because procedures permit attachment of property without prior notice or hearing upon filing of an action).

2. More than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case the public's right to know, the public's right to hear, the public's right to view is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected.

It follows therefore that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70; *Freedman v. Maryland*, 380 U.S. 51, 57. Thus, in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, the Court held that the issuanee of a ten day injunction restraining members of a political party from holding rallies was incompatible with the freedom of speech provisions of the First Amendment. The Court stated that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 393 U.S. at 180. The Court added the following salient observations:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the

balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." 393 U.S. at 183.

With respect to the *ex parte* seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed, have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression, without a prior adversary hearing to determine the alleged obscenity of the particular communication seized, constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First and Fourteenth Amendments. In *Marcus v. Search Warrants of Property*, 367 U.S. 717, 736, the Court observed that no prior decision of the Court supported the proposition that a State could impose extensive restraints on the distribution of publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material was legally obscene. In *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, the Court concluded "that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient." 378 U.S. at 211.

The *Books* ruling was followed in *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d .... (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934; *United States v. Alexander*, 428

F. 2d 1169 (8 Cir. 1970); *Wilhelm v. Turner,* 431 F. 2d 177 (8 Cir. 1970), cert. denied *sub nom. Turner v. Wilhelm,* 91 S. Ct. 919 (March 1 ,1971); *Cambist Films, Inc. v. Duggan,* 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy,* 393 F. 2d 202 (7 Cir. 1968); *Demich, Inc. v. Ferdon,* 426 F. 2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

At least six courts of appeals as aforestated, and many district courts, have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed access to non-obscene expression. A distillation of the views expressed by the courts indicates a firm belief that a prior adversary hearing, rather than an *ex parte* proceeding, is essential in cases involving alleged obscenity. An adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and makes certain that seizure or injunction will be limited only to those items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

If First Amendment rights are to be preserved the requirement of an adversary hearing should not turn on the question of whether or not there has been a "massive" seizure of allegedly obscene material. To make the right to an adversary hearing dependent upon the quantity of material seized would clearly under-

mine constitutional rights. The term "massive" should not be defined in terms of the quantitative measure of the items seized, but rather of the audience reached. "Appellants argue that there is a difference between the seizure of a large number of books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated." *Bethview Amusement Corp. v. Cahn,* 416 F. 2d 410, 412 (2 Cir. 1969), cert. denied 397 U.S. 920. If the effect of a seizure is to deprive members of the public to access to the matter involved then it is submitted an adversary hearing should be required if First Amendment rights are to be maintained.

There does not appear to be any overriding considerations which would justify the denial of a prior adversary hearing in a case involving the seizure of a motion picture film exhibited to the general public. The seizure of material in connection with the investigation of alleged violations of an obscenity law should not obviate the need for a prior adversary hearing. The decisions of the courts have shown that there are ample means available to a prosecutor to assure that evidence will be available in the event of the institution of criminal proceedings.

> "It is frequently suggested, and the Government so argues, that dealers in obscenity will be effec-

tively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for the securing of evidence remain available to prosecutors. See, e.g., Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Sokolic v. Ryan, 304 F.Supp. 213 (S.D. Ga. 1969); Gregory v. DiFlorio, 298 F.Supp. 1360 (W.D. N.Y. 1969). See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). We believe these cases answer the Government's concern." *United States v. Alexander*, 428 F.2d 1169, 1176 (8 Cir. 1970).

It is submitted that an adversary hearing prior to seizure or suppression of materials ordinarily entitled to constitutional protection is a vital necessity for assuring that neither the public nor the exhibitor will be deprived of a motion picture film which is entitled to constitutional protection under the First Amendment. A prior adversary hearing is that "sensitive tool" which insures the separation of legitimate from illegitimate speech and press.

II.

The Imposition of Criminal Sanctions Under a State General Obscenity Statute, as Construed and Applied to the Exhibition of a Nonobscene Motion Picture Film, Upon the Ground That Excerpts From the Film May Be "Offensive" or Invade the "Privacy" of Some Unknown Viewer, Abridges the Exercise of Freedoms of Speech and Press and Arbitrarily Deprives Persons of Liberty and Property Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments and the Interpretive Decisions of the Court.

While the discussion by Amicus here is concerned principally with the doctrinal considerations which should govern determination of causes such as the one herein involved, it should be stated initially that the particular record here would support petitioner's contentions that the judgment of conviction should be reversed. In the light of the decisions of the Court, the motion picture film here involved is not obscene and is entitled to constitutional protection. The state court below virtually conceded as much when it stated that the film "probably would pass the definitional obscenity test if the viewing audience consisted only of consenting adults". (App. 90). Thus, the general obscenity statute has been applied to a nonobscene film solely upon the ground that excerpts of the film might be deemed "offensive" to some unknown viewer and an invasion of his alleged "privacy". This has been done by the State without any prior notice by way of statute or charge and without any evidence to support even

such a vague and subjective standard. There is not the slightest evidence in the record of "pandering", nor the slightest evidence that any person was offended by any excerpt from the film or by the film in its entirety. Even under a specific statute with specific prohibitions and particular definitions, it is doubtful that the determination of what is offensive can be left to the sole discretion of each person who may be confronted with a display which he finds objectionable. In the case herein, however, there was no specific statute and no person who claimed an intrusion into his sensibilities by the exhibition of the film. The judgment of conviction here is unsupported by any evidence of guilt, and therefore should not stand in the light of due process requirements of the Constitution. *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Shuttlesworth v. Birmingham,* 382 U.S. 87.

1. One of the dangers to the exercise of freedoms of speech and press which flows from the ruling of the court below is the revival of the *Hicklin* test for judging obscenity, rejected by this Court "as unconstitutionally restrictive of the freedoms of speech and press". *Roth v. United States,* 354 U.S. 476, 489. The Court rejected the "most susceptible person" standard as well as the "isolated passages" test of the old English rule. Material, therefore, must be judged as a whole instead of by its parts, and it must be judged by its impact on average persons, not the highly susceptible.

A general obscenity statute which is used by a State to impose criminal sanctions upon the exhibitor of a motion picture film shown to the general public in a drive-in theater, merely because some hypothetical "non-consenting citizen" (App. 88) may deem some scene

in the film "offensive" or an invasion of "privacy", is not legislation "reasonably restricted to the evil with which it is said to deal". *Butler v. Michigan*, 352 U.S. 380, 383. In effect, the general public is being prohibited from seeing a constitutionally protected film in order to safeguard some hypothetical person who does not wish to be offended. The incidence of the ruling of the court below is to reduce the adult population of Washington to viewing only what is acceptable to the hypothetical "nonconsenting citizen". The statute therefore arbitrarily curtails the exercise of freedoms of speech and press and capriciously obstructs the access of the public to constitutionally protected material, in violation of the First and Fourteenth Amendments.

Reliance upon "a 'contextual' approach to materials not strictly definable as obscene" (App. 91) means no more, it is submitted, than the denial of constitutionally protected material to the general public, simply because the material may be deemed deleterious to some peripheral members of the community not typical of the general public. The invocation of such a rule under a general obscenity statute is no more than a return to *Hicklin*. A State cannot bar the exhibition of nonobscene motion picture films entitled to constitutional protection, shown to the public generally, by asserting the supposed "offensiveness" to some unknown member of the community. Such a hypothetical person cannot be used, it is submitted, as a justification for prohibition and the imposition of criminal sanctions under a general obscenity statute assumedly constricted to the constitutional standards for judging obscenity enunciated by the Court.

2. A concurring opinion in the court below rejects the "contextual" approach because the record was barren of proof of any actual assault upon the rights of a nonconsenting individual, emphasizing that "there seems to be no indication that, in fact, the individual privacy of any homeowner or passing motorist was assaulted" (App. 103). Nevertheless, concurrence is predicated upon the doctrine of "pandering".

Reliance upon "pandering" under a general obscenity statute, without specific prohibition and without specific charge to justify a criminal prosecution, represents another hazard to the exercise of freedoms of speech and press under the First and Fourteenth Amendments. The use of this talismanic label in the obscenity area has led in most cases to the opening of the door wider for a standard based on the personal predilections of judge or jury. In essence, the generalized language of the Court in *Ginzburg v. United States,* 383 U.S. 463, has been used to suppress material concededly nonobscene and entitled to constitutional protection. In similar fashion, the precise holding in *Mishkin v. New York,* 383 U.S. 502, has been transformed into a means of punishing and suppressing nonobscene material under a vague and ambiguous concept of "variable obscenity". The Court has indicated since *Ginzburg* that the cases are rare in which evidence of the sort of "pandering" which the Court found significant in *Ginzburg* exists. This is so because the essence of *Ginzburg* was that with respect to the material in that case, the petitioners "proclaimed its obscenity" (383 U.S. at 472). The Court since *Ginzburg,* and particularly in *Redrup v. New York,* 386 U.S. 767, and the cases which followed, has made it clear that the pandering test is to be applied only in the rare case where the

evidence clearly, convincingly and unequivocally establishes that the accused "proclaimed the obscenity" of the material. See, *United States v. Baranov*, 418 F. 2d 1051 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F. 2d 1241 (8 Cir. 1971).

The indiscriminate use of the "pandering" test not only deprives members of the public of access to constitutionally protected expression, but the test is also "hopelessly vague and incapable of objective administration". Emerson, *The System of Freedom of Expression* (1970) p. 490. The result is "that the pandering test adds an additional level of vagueness to the already vague complex of tests for obscenity and necessarily produces a far greater repressive effect". *Id.*

Similarly, the precise ruling in *Mishkin* has been extended far beyond its confines to endanger the exhibition and dissemination of expression clearly entitled to constitutional protection. In *Mishkin*, the Court emphasized that the material must be "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large." (383 U.S. at 508). In *Redrup*, the Court stressed the requirement of a statute which "reflected a specific and limited state concern for juveniles". (386 U.S. at 769). See also, *Jacobellis v. Ohio*, 378 U.S. 184, 195. Since, "aside from the enforcement problems, which could be monumental, the variable approach requires an imposing number of determinations, some of them exceedingly subjective", (Magrath, *The Obscenity Cases: Grapes of Roth*, 1966, S. Ct. Rev. 7, 66-67), it is evident that the use of such vague standards as "pandering" and "variable obscenity" under a general obscenity statute, without specific prohibition, without

specific charge, and without any proof in support thereof, creates the very uncertainties, ambiguities and harassments which gravely undermine the exercise of freedoms of speech and press.

3. There is a further constitutional infirmity in the argument that a general obscenity statute may be used to punish the exhibition of a nonobscene and constitutionally protected motion picture film in a drive-in theater, merely because some hypothetical resident in a nearby dwelling or a passerby in a motor vehicle may deem a momentary viewing of a scene as "offensive" or an invasion of "privacy". Again, we are not dealing here with a specific "statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California [Washington] law, not be tolerated in certain places". *Cohen v. California,* 91 S. Ct. 1780, 1785. Nor do we deal here with any charge or proof of an actual assault upon the privacy of any individual. What the State is actually saying is that the exhibition of nonobscene constitutionally protected motion picture films in a drive-in theater to the general public may be suppressed at any time, on the arbitrary and capricious determination of a police officer, judge or jury, that some hypothetical resident in a nearby dwelling may be "offended".

We do not deal here with "any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it". *Redrup v. New York,* 386 U.S. at 769. This is not a case where the community by precise statutory provisions has affirmatively made known its view that it desires to avoid house-to-house canvassing to secure subscriptions, leav-

ing all other forms of solicitation available. *Breard v. Alexandria,* 341 U.S. 622. *Cf., Martin v. Struthers,* 319 U.S. 141. See also, *Rowan v. United States Post Office Department,* 397 U.S. 728. The issue does not involve a "captive audience" in any meaningful sense. See, *Public Utilities Commission v. Pollak,* 343 U.S. 451. What is really involved here is an attempt to so broaden the concept of obtrusive offensiveness as to prohibit and suppress any motion picture film shown in a drive-in theater which may be deemed subjectively objectionable to the most hypothetically prudish person in the community.

The Court has stated that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects when it presses for acceptance of an idea". *Terminiello v. City of Chicago,* 337 U.S. 1, 4. In *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 688-689, the Court stated, "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no

less than that which is unconvincing. In *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390, the Court stated, "it is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC".

In short, we do not deal here with a specific and precise statute, narrow in its prohibitions, intended solely to avoid invasion of substantial privacy interests in a plainly obtrusive manner. On the contrary, what is involved here is the use of a general obscenity statute intended to effect the censorship of all motion picture films exhibited in a drive-in theater under broad, vague and ambiguous standards, administered subjectively by governmental officials. The latter course is denied a State by the explicit provisions of the First and Fourteenth Amendments.

4. The Court has emphasized that a State cannot foreclose the exercise of constitutional rights by mere labels. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269. The Court has constantly reiterated that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. *Smith v. California*, 361 U.S. 147, 150; *New York Times Co. v. Sullivan*, 376 U.S. at 265-266. Such terms as "commercial exploitation", "pandering", and "offensiveness" should not be turned into "formulae for the repression of expression" nor receive "immunity from constitutional limitations". 376 U.S. at 269.

The Court has emphasized that statutes must be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights, as well as those attempting to enforce the law, will know definitely

what is being prohibited. This doctrine of vagueness has been accompanied by the concomitant rule of overbreadth. The latter rule demands that the statute be framed to cover only that conduct which is constitutionally subject to control, and not embrace conduct under the First Amendment. Emerson, *The System of Freedom of Expression*, at 364-365.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.Ct.1708, 1717, 6 L.Ed.2d 1127. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California, supra, 361 U.S. at 151-154, 80 S.Ct. at 217-219; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
>
> *NAACP v. Button*, 371 U.S. 415, 432-433.

The statute here, as construed and applied by the court below to the exhibition of a nonobscene motion picture film in a drive-in theater, in light of all the preceding discussion in this brief, has been rendered vague, ambiguous, uncertain and overbroad, and is, therefore, constitutionally infirm.

Conclusion.

For all of the foregoing reasons, the ruling and judgment of the court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
SEYMOUR I. FEIG,
Attorneys for Amicus Curiae.

SAM ROSENWEIN,
Of Counsel.